Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1993

MARY WILLIAMS and JAMES WILLIAMS,

Petitioners,

v.

RICHMOND COUNTY, GEORGIA, SHERIFF CHARLES WEBSTER, CAPTAIN RAY MYERS, TINA JOHNSON, JIM SHEPPARD, and UNIVERSITY HEALTH SERVICES INC. d/b/a UNIVERSITY HOSPITAL AMBULANCE SERVICE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether a police SWAT commander who dispatches a SWAT entry team into a dwelling to seize a mentally ill person barricaded in a bedroom may be held liable under 42 U.S.C. Sec. 1983 for a Fourth Amendment unreasonable seizure where the decision to deploy violates a national standard of care followed by reasonable SWAT team commanders and proven by expert testimony.

2. Whether emergency medical technicians acting in concert with the police to transport an injured arrestee have a duty under the Fourteenth Amendment to provide medical care which is not deliberately indifferent to the arrestee's serious medical needs, and if so, whether their failure to assess or treat an obvious gunshot wound establishes a deliberate indifference claim under 42 U.S.C. Sec. 1983 where it has been demonstrated by expert testimony that the conduct of the defendants amounts to an entire want of care.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the Southern District of Georgia and the Eleventh Circuit Court of Appeals were:

Richmond County, Georgia, Sheriff Charles Webster, Captain Ray Myers, Tina Johnson, Jim Sheppard, Steve Buchanan, University Health Services, Inc. d/b/a University Hospital Ambulance Service, Richmond County Hospital Authority d/b/a University Hospital Ambulance Service, and North River Insurance Company.

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INTRODUCTION AND JURISDICTION

This petition for certiorari presents an issue of first impression regarding the extent to which SWAT team deployments fall within the ambit of the Fourth Amendment unreasonable seizure clause. This issue has important public policy ramifications due to the recent tragedy in Waco, Texas and other incidents in which law enforcement officials have increasingly relied upon military-style tactics to take custody of noncompliant citizens. This case also involves the novel issue of whether emergency medical technicians summoned by the police to assist in the apprehension of a barricaded person are state actors for purposes of a Fourteenth Amendment claim alleging deliberate indifference to medical needs by failure to diagnose or treat an obvious gunshot wound.

This petition arises from a per curiam decision of the United States Court of Appeals for the Eleventh Circuit, *Williams v. Richmond County,* Case No. 92-8869 (11th Circuit 3/8/94) (App. 1), affirming the order and judgment of the United States District Court, Southern District of Georgia, granting the defendants' motion for summary judgment. *Williams v. Richmond County,* 804 F. Supp. 1561 (S.D. Ga. 1992) (App. 3)

This petition for certiorari is being docketed on or about June 2, 1994, within 90 days of the date of the judgment being appealed from, as required by 28 U.S.C. Sec. 2101(c).

Jurisdiction is based on 28 U.S.C. Sec. 1254(1). Certiorari is warranted on the grounds that the Court of Appeals has summarily decided an important question of federal constitutional law which has not been, but should

be, settled by this Court, and has decided that question in a way which conflicts with analogous precedent established by this Court. Sup. Ct. R. 17.1.(c).

OPINIONS BELOW

The judgment appealed from is *Williams v. Richmond County,* Case No. 92-8869 (11th Cir. 3/8/94) (per curiam) (App. 1). The trial court order appealed from is *Williams v. Richmond County,* 840 F. Supp. 1561 (S.D. Ga. 1992) (App. 3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment IV (1791)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oaths or affirmations, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FEDERAL ISSUES PRESENTED

Petitioner Mary Williams was shot and rendered a paraplegic by a sheriff's department SWAT team on November 20, 1989. Several hours earlier, Mrs. Williams had barricaded herself in a bedroom because sheriff's deputies were attempting to serve a civil commitment order directing that she be temporarily hospitalized for psychiatric evaluation. She made numerous threats through the closed door, but she was not a threat to anyone as long as she was left alone in the bedroom. At one point, she had attempted to stab a deputy sheriff who tried to make his way into the bedroom, but as long as the officers kept their distance, she was not in a position to injure anyone.

After several hours of negotiation through the closed door, the department's SWAT team was called to the scene. The commander of the SWAT team, Captain Ray Myers, immediately assumed control of the entire police operation. Just minutes after being briefed by officers already on the scene, Captain Myers devised a plan for the SWAT team to enter the dwelling and forcibly remove Mrs. Williams from the locked bedroom. The fact that Myers was authorized to make such a decision was itself

a gross deviation from national SWAT standards, which dictate that a neutral command element be physically present at the scene and make any necessary decisions regarding the escalation of force. The SWAT continuum of force, which is part of the same standard of care, mandates that an entry team not be sent into a building occupied by a barricaded suspect until every intermediate level on the continuum of force has been exhausted.

Specifically, the applicable standard of care forbids the SWAT team from entering the building unless the subject barricaded inside presents an immediate threat to the life of a hostage or other person, because the deployment of a SWAT entry team is tantamount to the use of deadly force. When a individual – particularly a mentally disturbed person with a knife – is confronted within close confines by an invading armed force, it is almost inevitable that the individual will respond defensively with certain tragic consequences. As long as there are no exigent circumstances requiring the immediate seizure of a barricaded individual within the close confines of a building, no reasonable SWAT commander in the civilian law enforcement community would have ordered such a seizure, and in fact, no reasonable command structure would have entrusted the SWAT commander himself with the ultimate authority to make such a decision. These standards, as well as the sheriff's department's deviation therefrom, were documented by substantial expert testimony in the trial court; however, the courts below chose to ignore petitioner's experts and ruled that the seizure was reasonable as a matter of law.

Petitioners contend that the shooting of Mary Williams was a direct and proximate result of Captain Myers'

decision to order the SWAT team into the house, and this order was as much a part of the seizure as its execution. The shooting was an inevitable consequence of the seizure which cannot be analytically separated as an independent seizure in and of itself. Petitioners elected to drop their claim against the individual SWAT team member who pulled the trigger and to instead focus on the reasonableness of Captain Myers' order to seize Mrs. Williams inside the house.

This case presents the interesting question of whether the reasonableness of a seizure should be analyzed in its entirety or broken down into component parts, i.e., on a decision-by-decision, tactic-by-tactic, or gunshot-by-gunshot basis. The trail court took the tenuous position that the decision to shoot was a separate and distinct seizure to be analyzed on its own merits as an intervening break in the causal chain between the commander's order and the eventual pulling of the trigger. The more reasoned approach would be to view the seizure as a whole rather than trying to evaluate the potential culpability of every component decision and act making up that seizure, with the seizure being defined as the process – whether lasting a fraction of a second or several hours – actually employed by the police to effect control and custody over the individual being seized.

When the SWAT team invaded the house, a stand-by ambulance was already present on the scene. After Mrs. Williams was shot inside, the deputy sheriffs brought her to the front door where she was placed on a stretcher and taken to the ambulance by two emergency medical technicians (EMTs), Tina Johnson and Jim Sheppard. The depositions of two deputies at the scene indicate that the

EMTs were told to check Mrs. Williams for a gunshot wound, but the EMTs claim that they were not aware Mrs. Williams had been shot. Consequently, they did not use a backboard or any other spinal immobilization techniques mandated by the applicable standard of care. According to Petitioners' experts, the EMTs' failure to immobilize Mrs. Williams' spine or otherwise assess and treat her obvious gunshot injury amounted to an entire want of care indicative of deliberate indifference to her medical needs, which had the effect of aggravating her gunshot wound and probably causing her to suffer additional paralysis due to the proximity of the bullet to the spinal cord. Although the trial court properly held that the EMTs were state actors because they were transporting Mrs. Williams in handcuffs while she was in the custody of the police (App. 15), the court nonetheless disregarded the expert testimony and ruled as a matter of law that the care provided by the EMTs was constitutionally adequate.

THE QUESTIONS ARE SUBSTANTIAL

1. **Whether a police SWAT commander who dispatches a SWAT entry team into a dwelling to seize a mentally ill person barricaded in a bedroom may be held liable under 42 U.S.C. Sec. 1983 for a Fourth Amendment unreasonable seizure where the decision to deploy violates a national standard of care followed by reasonable SWAT team commanders and proven by expert testimony.**

Although the trial court acknowledged that the SWAT team's seizure of Mrs. Williams was subject to the

objective reasonableness analysis of the Fourth Amendment, the Court nonetheless erred by applying the Eighth Amendment analysis of *Whitley v. Albers*, 475 U.S. 312, 106 S. Ct. 1078 (1986) to the facts of this case. (App. 19-21) *Whitley* merely held that "the unnecessary and wanton infliction of pain" against a convicted prisoner constitutes cruel and unusual punishment forbidden by the Eighth Amendment, and thus the good faith application of force for prison security purposes was not a constitutional violation. In *Whitley*, this Court specifically noted that its holding was not intended to imply anything with regard to the protection afforded pretrial detainees or persons enjoying unrestricted liberty who are seized through arrest, detention, or the use of excessive force. 106 S. Ct. at 1088. Subsequently, this Court went on to decide *Graham v. Connor*, 109 S. Ct. 1865 (1989), which holds that the Fourth Amendment provides the exclusive standard for evaluating the constitutionality of police actions against free citizens at liberty. *Accord Albright v. Oliver*, 62 U.S.L.W. 4078 (1994).

Despite the considerable expert criticism of the SWAT team's actions in seizing Mrs. Williams, the trial court looked beyond that testimony and instead based its determination of reasonableness upon the subjective components of the *Whitley* test. (App. 20-21) By incorporating the elements of a subjective intent requirement into an objective reasonableness standard, rather than applying the correct standard directly to the facts in the record, the trial court has produced a published opinion which starkly conflicts with the mandates of this Court. 109 S. Ct. 1865; *see also, Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694 (1985)

The Fourth Amendment categorically prohibits unreasonable seizures of persons. The term "seizure" has been defined very broadly and in a variety of factual contexts. This Court has articulated at least three definitions for determining whether police officers have made a Fourth Amendment seizure:

(1) Whether "the officer, by means of physical force *or show of authority,* has in some way restrained the liberty of a citizen." *Terry v. Ohio,* 392 U.S. 1, 19, n. 16 (1968) (emphasis added);

(2) Whether "in view of all circumstances surrounding the incident, *a reasonable person would have believed that he was not free to leave." United States v. Mendenhall,* 446 U.S. 544, 554 (1980) (emphasis added); *see also, INS v. Delgado,* 466 U.S. 210, 215 (1984); and,

(3) Whether there was "a governmental *termination of freedom of movement* through means intentionally applied." *Brower v. County of Inyo,* 489 U.S. 593, 597 (1989) (emphasis added).

Under any or all of these definitions, the mobilization of the SWAT team against Mary Williams constituted a seizure. Certainly, the deployment of the SWAT entry team with its riot batons, guns, tear gas, and gas masks was a sufficient "show of authority" to restrain the liberty of Mrs. Williams. 392 U.S. at 19. Under such circumstances, "a reasonable person would have believed that [she] was not free to leave." 446 U.S. at 554. Moreover, the act of surrounding the house and sending a SWAT team into the house was certainly "a governmental termination

of freedom of movement through means intentionally applied." 489 U.S. at 597. The trial court's position (App. 21-22) is that the seizure began and ended with the justified, split-second firing of the deputy's gun; however, the Petitioners urge this Court to adopt a more expansive definition of "seizure," as suggested by Justice Ginsberg's concurring opinion in *Albright v. Oliver,* 62 U.S.L.W. 4078, 4081-4082 (1994).

This Court has never held that physical contact must take place between an officer and a citizen before a Fourth Amendment "seizure" can occur. While it is probably safe to say that the use of physical force by an officer will always constitute a "seizure" of some magnitude, physical contact is not required. In *Florida v. Bostick,* 111 S. Ct. 2382 (1991), this Court's varying definitions of "seizure" were synthesized into the following standard:

> "Whether, taking into account all of the circumstances surrounding the *encounter,* the police conduct would have communicated to a reasonable person that he was *not at liberty to ignore the police presence and go about his business."*

111 S. Ct. at 2387 (emphasis added). Clearly no person – reasonable or otherwise – would have considered herself "at liberty to ignore the police presence and go about [her] business" while the police were surrounding her, forcing her from her bedroom with tear gas, and blocking her only means of escape with sticks and guns. *See also, Michigan v. Chesternut,* 108 S. Ct. 1975 (1988) (seizure occurs where police action creates an objectively reasonable belief that a person is not free to avoid police custody).

These definitions have been applied in a wide variety of law enforcement contexts. For instance, this Court has held that the unnecessary use of deadly force is a Fourth Amendment unreasonable seizure. *Tennessee v. Garner,* 471 U.S. 1, 105 S. Ct. 1694 (1985) Likewise, the use of non-deadly force by an officer against a free citizen is to be evaluated under the objective reasonableness standard of the Fourth Amendment. *Graham v. Connor,* 109 S. Ct. 1865 (1989) Although this Court has yet to rule on the issue, at least one lower court has held that the mere show of force by a SWAT team, even without physical contact or injury, can give rise to a cause of action under 42 U.S.C. Sec. 1983. *See Kjorlie v. Lundin,* 765 F. Supp. 671 (D. Kan. 1991) Similarly, a Fourth Amendment seizure can occur when a person is locked in her office, *Cassady v. Tackett,* 938 F. 2d 693 (6th Cir. 1991), or when a passenger car is stopped by a roadblock designed to stop the driver, *Jaminson v. Shaw,* 772 F. 2d 1205 (5th Cir. 1985) In *Brower v. County of Inyo,* supra, this court held that a Fourth Amendment seizure occurs when police stop a vehicle at a roadblock. Following *Brower,* the case of *Jones v. State,* 572 A. 2d 169, 172 (Md. 1990), held that police officers had effected a seizure by commanding a suspect to halt, because the statement itself communicated an attempt to capture. Most recently, this Court held that a seizure occurs when a citizen voluntarily surrenders himself pursuant to an arrest warrant. *Oliver v. Albright,* 62 U.S.L.W. 4078 (1994)

In view of all these precedents, it is not necessary that there be physical contact between the officer and the citizen in order to implicate the protections of the Fourth Amendment, but this Court has not yet decided how the Fourth Amendment applies to a Waco-style seizure by a

SWAT team. To establish a Fourth Amendment claim, Petitioners are only required to prove that they were "seized" within the meaning of the Fourth Amendment and that the seizure was effected in an unreasonable manner. Once that is established, Petitioners are entitled to recover damages for all injuries proximately flowing from the deprivation of their Fourth Amendment rights. In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court held that 42 U.S.C. Sec. 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* at 187. *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092 (1986), cites *Monroe v. Pape* for this very proposition, stating that since the common law had recognized the causal link between a false affidavit by a police officer and an ensuing arrest by another officer, Sec. 1983 should be read as recognizing the same causal link. 106 S. Ct. at 1098.

In the case at bar, Mary Williams was shot by a SWAT team member who was simply following orders. Captain Myers knew that Mrs. Williams was locked in a room with a knife, and he told the SWAT team to shoot if she tried to use it. By putting gas in the room and forcing her to collide with a waiting deputy who was blocking her sole means of escape, it was foreseeable if not inevitable that she would be shot. According to Petitioners' experts, the SWAT team should not have gone into the house in the first place, since there were no exigent circumstances requiring them to intentionally create a confrontation which would force them to shoot her rather than simply waiting her out and allowing the passage of time to do all the work. If Petitioners were rightfully allowed their day in court, the injuries suffered by Mrs. Williams as a result

of the shooting would be compensable items of damages since they were "natural consequences" of Captain Myers' unreasonable decision to deploy the entry team. 365 U.S. at 187.

2. Whether emergency medical technicians acting in concert with the police to transport an injured arrestee have a duty under the Fourteenth Amendment to provide medical care which is not deliberately indifferent to the arrestee's serious medical needs, and if so, whether their failure to assess or treat an obvious gunshot wound establishes a deliberate indifference claim under 42 U.S.C. Sec. 1983, where it has been demonstrated by expert testimony that the conduct of the defendants amounts to an entire want of care.

Once Mrs. Williams was seized, she had a constitutionally protected right to adequate medical care. *West v. Atkins*, 108 S. Ct. 2250 (1988); *Aldridge v. Montgomery*, 753 F. 2d 970 (11th Cir. 1985); *see also, Mandel v. Doe*, 888 F. 2d 783 (11th Cir. 1989) and *Waldrop v. Evans*, 871 F.2d 1030 (11th Cir. 1989) Because Respondents Sheppard and Johnson were entrusted with the medical care of Mary Williams during the course of her apprehension and detention, they had a duty to provide her with at least the minimal level of treatment required by the Constitution and to not ignore her obvious gunshot wound. That duty was recognized by the trial court, and Respondents did not appeal this or any other portion of the decision below. (App. 15) However, such a duty does not require that the medical care provided be "perfect, the best attainable, or even very good." *Harris v. Thigpen*, 941 F. 2d 1495, 1510

(11th Cir. 1991). In order to rise to the level of a Fourteenth Amendment violation, the care must be so inadequate as to constitute "deliberate indifference" to the serious medical needs of the detainee. *Id.*

In *Waldrop v. Evans*, 871 F. 2d 1030, 1033 (11th Cir. 1989), the Eleventh Circuit held that "grossly incompetent or inadequate care," or a "decision to take an easier and less efficacious course of treatment" is necessary to satisfy the deliberate indifference standard. Thus, it is not necessary for a prisoner to prove a complete denial of all medical care to show a violation of his or her rights. *Id.; see also, Mandel v. Doe*, 888 F. 2d 783 (11th Cir. 1989) (liability established where physician's assistant at jail misdiagnosed inflammation of inmate's leg and prescribed pain relievers, but consistently refused to refer him to doctor or have x-rays taken which would have resulted in a correct diagnosis).

Petitioners have made a prima facie case that the medical care (or lack thereof) provided to Mary Williams was so deficient as to violate even the minimal standards of the Fourteenth Amendment, and the courts below committed reversible error by disregarding the unequivocal testimony of Petitioners' medical experts. Mrs. Williams suffered a gunshot wound which should have been obvious to any trained paramedic or emergency medical technician, but the EMTs failed to detect the wound or to stabilize her spine in the event that there was such a wound – even though at least two police officers told them to check Mrs. Williams for a gunshot wound. Petitioners' emergency medical expert testified that the conduct of the Defendant EMTs constituted a complete disregard for the applicable standard of care and could be

described as nothing other than "deliberate indifference" to the obvious medical needs of Mrs. Williams. The trial court's complete lack of regard for the expert testimony in this case is an impermissible invasion of the province of the jury in a case with important public policy ramifications.

CONCLUSION

For these reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted this 3rd day of June, 1994.

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APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8869

D.C. Docket No. CV 192-39

(Filed Mar. 8, 1994)

MARY WILLIAMS, Individually, JAMES WILLIAMS, Individually and as Husband and Next Friend of Mary Williams,

Plaintiffs-Appellants,

versus

RICHMOND COUNTY, GEORGIA, CHARLES WEBSTER,

Defendants-Appellees,

STEVE BUCHANAN,

Defendant,

TINA JOHNSON, JIM SHEPPARD, RICHMOND COUNTY HOSPITAL AUTHORITY, dba University Hospital Ambulance Service, UNIVERSITY HEALTH SERVICES, INC., NORTH RIVER INSURANCE COMPANY, RAY MYERS, Captain Ray Myers,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Georgia

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(March 8, 1994)

Before BIRCH, Circuit Judge, CLARK, Senior Circuit Judge, and HOEVELER*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

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*Honorable William M. Hoeveler, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MARY WILLIAMS, Individually; and JAMES WILLIAMS, Individually and as Husband and Next Friend of Mary Williams,	*	
Plaintiffs	*	CIVIL ACTION CV 192-39
vs.	*	(Filed Aug. 26, 1994)
RICHMOND COUNTY, GEORGIA; SHERIFF CHARLES WEBSTER; CAPTAIN RAY MYERS, in his Official Capacity Only; TINA JOHNSON; JIM SHEPPARD; RICHMOND COUNTY HOSPITAL AUTHORITY d/b/a University Hospital Ambulance Service; UNIVERSITY HEALTH SERVICE, INC., d/b/a University Hospital Ambulance Service; and THE NORTH RIVER INSURANCE COMPANY,	*	
Defendants	*	

ORDER

Plaintiffs brought this action under 42 U.S.C. § 1983, along with pendent state law claims. Before the Court is

the Motion for Summary Judgment by Defendants Richmond County Hospital Authority, University Health Service, Tina Johnson, and Jim Sheppard; and the Motion for Summary Judgment by Defendants Richmond County, Sheriff Charles Webster, Captain Ray Myers, and North River Insurance.

On the afternoon of November 20, 1989, deputies of the Richmond County Sheriff's Department attempted to serve an order of the Probate Judge of Richmond County to apprehend Plaintiff Mary Williams, who, according to the order, was "a mentally ill person requiring involuntary treatment." Two of Ms. Williams's brothers had submitted an affidavit stating that she presented a substantial risk of imminent harm to herself or others, "as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to [herself] or other persons. . . . "

By prearrangement, at approximately 5:00 p.m. deputies met one of Ms. Williams's brothers at the house of the other brother, where Ms. Williams was staying. The brother let the officers into the house. Ms. Williams locked herself in a back room and threatened to shoot the deputies. Officers attempted to talk Ms. Williams into coming out but were unsuccessful. A brother opened the room door with a knife, but Ms. Williams shut the door again. A deputy grabbed the doorknob so that it would not lock and then opened the door. Ms. Williams swung or stabbed a butcher knife at him, injuring him slightly. The deputies retreated, and Ms. Williams barricaded herself in the room.

During the course of the evening deputies, a Sheriff's Department negotiator, Ms. Williams's brothers, and a minister attempted to talk Ms. Williams into coming out, but to no avail. The Richmond County Sheriff's Department SWAT team was called into action, and Defendant Ray Myers, officer in charge of the SWAT team, arrived at the scene. The SWAT team entered the house, and, approximately four hours after deputies first arrived at the location, officers fired tear gas into the room in an effort to bring Ms. Williams out.

In an attempt to make it easier to subdue her, deputies had placed a table outside the room door to cause Ms. Williams to trip as the gas forced her from the room. Ms. Williams did exit the room but avoided the table and, armed with the knife, advanced toward an officer who attempted to back away and stumbled. A nearby fellow officer who witnessed Ms. Williams's action, Deputy Steve Buchanan, responded by firing a single shot which struck Ms. Williams in the side. Deputies then handcuffed her arms behind her back and removed her from the house.

Ms. Williams, a large woman described as being obese, was placed in a prone position on a stretcher and carried to a waiting University Hospital ambulance, which deputies had earlier called for. Defendant Jim Sheppard, an emergency medical technician (EMT), drove the ambulance to University Hospital approximately two miles away; Defendant Tina Johnson, also an EMT, attended to Ms. Williams during the trip. According to the ambulance trip report signed by Sheppard and Johnson, "[a] deputy stated p[atien]t had been 'hit'," but it was "unknown what was meant by this." The report

further noted that, although Ms. Williams was still handcuffed, she was "thrashing about," and the EMT was "unable to do a[n] adequate survey due to [patient] activity." During the trip to the hospital, Ms. Williams asked if she had been shot, and Johnson said no. The bullet wound was not discovered until Ms. Williams reached the hospital and was rolled over for transfer to another stretcher. The projectile had apparently lodged near Ms. Williams's spine, and she became paralyzed.

Plaintiffs subsequently brought an action under 42 U.S.C. § 1983. Plaintiffs claim that Defendants Richmond County Hospital Authority, University Health Service, Tina Johnson, and Jim Sheppard were acting under color of state law and, by Johnson and Sheppard's alleged failure to adequately examine and immobilize Ms. Williams, were deliberately indifferent to her medical needs in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Plaintiffs also brought pendent state law claims against University Health Service (UHS), Johnson, and Sheppard. These Defendants moved for Summary Judgment.

Plaintiffs raised § 1983 claims against Defendants Richmond County, Sheriff Charles Webster, and Captain Ray Myers. Captain Myers allegedly seized the Plaintiff unreasonably in violation of the Fourth and Fourteenth Amendments to the United States Constitution by deploying the SWAT team against her. Plaintiffs also claimed that Richmond County and its Sheriff, Charles Webster, maintained policies, procedures, and customs which led to the alleged unreasonable seizure. Pendent state law claims were also included. Defendant North River Insurance (bonding company for Sheriff Charles

Webster) was alleged to be liable under state law for Sheriff Webster's acts that were allegedly in breach of his bond. These Defendants also moved for Summary Judgment.

II. THE REQUIREMENTS FOR SUMMARY JUDGMENT

The Court should grant summary judgment only if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the burden of showing that there is no genuine dispute as to any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Clemons v. Dougherty County*, 684 F.2d 1365, 1368 (11th Cir. 1982). The party moving for summary judgment may meet this burden upon showing that the adverse party has failed to make a showing sufficient to establish the existence of an element essential to the adverse party's case, and on which the adverse party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). If any factual issue is unresolved by the motion for summary judgment, then the Court may not decide that matter. *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981).

The Court must resolve all reasonable doubts in favor of the adverse party. *Casey Enterprises, Inc. v. American Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981). When, however, the moving party's motion for summary judgment pierces the pleadings, the burden then shifts to the adverse party to show that a genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The adverse party cannot carry this

burden by reliance on the pleadings, or by repetition of conclusory allegations contained in the complaint. *Morris v. Ross*, 663 F.2d 1032, 1033 (11th Cir. 1981), *cert. denied*, 456 U.S. 1010 (1982). Rather, the adverse party must respond by affidavits or as otherwise provided in Fed. R. Civ. P. 56.

The Clerk has given the adverse party notice of the motions for summary judgment, the right to file affidavits or other materials in opposition to the motion, and of the consequences of default. *See Griffith v. Wainwright*, 772 F.2d 822 (11th Cir. 1985). Thus, the notice requirement of *Griffith* is satisfied. The parties having submitted any desired responses and materials in support thereof, I will now rule upon the motion.

III. ANALYSIS

A. Motion for Summary Judgment by Defendants Richmond County Hospital Authority, University Health Service, Tina Johnson, and Jim Sheppard.

Once again, this Court is called upon to examine the relationship between Richmond County Hospital Authority (RCHA) and University Health Services (UHS) for purposes of an action brought under 42 U.S.C. § 1983. *See Willis v. University Health Serv., Inc.*, No. CV190-317 (S.D. Ga. July 27, 1992); *Coleman v. University Hosp.*, No. CV187-117 (S.D. Ga. Apr. 28, 1988).

42 U.S.C. § 1983 provides a cause of action for persons whose rights, privileges, or immunities secured by the Constitution or laws of the United States have been

deprived "under color of any statute, ordinance, regulation, custom, or usage, of any State. . . . " 42 U.S.C. § 1983. A governmental employer is liable under § 1983 for the acts of its employee only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the [deprivation of rights]. . . . " *Monell v. Department of Social Serv.*, 436 U.S. 658, 694 (1978).

Defendant UHS is a private, non-profit corporation that operates University Hospital and its ambulance service pursuant to a lease agreement with Richmond County Hospital Authority (RCHA). RCHA is a public hospital authority "created . . . by resolution of the Board of Commissioners of Richmond County, pursuant to the Hospital Authorities Act. . . . " *Richmond County Hosp. Auth. v. Richmond County*, 336 S.E.2d 562, 563 (Ga. 1985). As such, RCHA may be liable under § 1983 for actions taken pursuant to its policies. *See Wofford v. Glynn Brunswick Mem. Hosp.*, 864 F.2d 117, 118 (11th Cir. 1989).

1. RCHA asserts that it is not a proper party to this action, because it does not employ Defendant ambulance attendants Johnson and Shepherd. Plaintiffs contend there is a jury question regarding the existence of an agency relationship between RCHA and UHS arising out of the lease agreement to operate the ambulance service. Plaintiff characterizes the relationship as a delegation of policymaking and decisionmaking authority from RCHA to UHS, and asserts that the customs, practices, policies of UHS are therefore imputable to RCHA.

The lease agreement between RCHA and UHS provides, *inter alia:*

> RCHA as lessor does hereby lease to UHS, as lessee, for a term of forty (40) years, the University Hospital and its related facilities . . . upon the following additional terms and conditions:
>
> . . .
>
> 5. Ambulance service
>
> (a) UHS shall operate the ambulance service so long as funding for such services is made available to UHS or RCHA by Richmond County.
>
> (b) . . . RCHA transfers, assigns and conveys to UHS all its right, title and interest in and to the revenues payable to RCHA arising under and by virtue of the present ambulance service contract, or any successor contract, with Richmond County. . . .
>
> 12. Employees and employee benefits. All employees or RCHA shall become employees of UHS. . . . UHS shall have the discretion to hire, terminate, promote or assign employees and to hire agents or independent contractors.

This is a transfer of interests between two entities that are separate in the eyes of the law. *See Richmond County Hosp. Auth.*, 336 S.E.2d at 565. UHS controls the operation of the ambulance service, and ambulance attendant employees of UHS are not employees of RCHA. RCHA cannot be held liable under § 1983 for the acts of UHS employees Johnson and Sheppard.

2. Defendants UHS, Johnson, and Sheppard contend that the requisite state action for purposes of a § 1983 cause of action against them is not present in this case.

" '[P]rivate conduct is fairly attributable [to state action] only when the state has had some affirmative role, albeit one of encouragement short of compulsion, *in the particular conduct underlying a claimant's civil rights grievance.*' " *National Broadcasting Co. v. Communications Workers of Am.*, 860 F.2d 1022, 1025. n.4 (11th Cir. 1988) (emphasis added). The acts of a private entity may be deemed to be state acts where: (1) there is a sufficiently close nexus between the state and the challenged action; (2) the state has so coerced or encouraged a private act that it must be considered the act of the state; and (3) the private entity exercises powers traditionally reserved exclusively to the state. *Blum v. Yaretsky*, 457 U.S. 991 (1982).[1] The determination of whether there is sufficient state action by a non-state defendant to sustain a § 1983 claim must be made on a case-by-case basis. *Bailey v. McCann*, 550 F.2d 1016, 1018 (5th Cir. 1977).

(a) Defendant UHS asserts that the state does not play a role in the policymaking decisions or day-to-day operations of the UHS ambulance service. In support, Defendant cites this Court's decision in *Coleman v. University Hospital*, No. CV187-117 (S.D. Ga. Apr. 28, 1988). In

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[1] "While specifically the *Blum* court spoke of holding the state liable pursuant to state action doctrine, the standard remains constant when a party seeks to hold a private actor liable under the state action doctrine." *National Broadcasting Company v. Communications Workers of Am.*, 860 F.2d 1022, 1025 n.4 (11th Cir. 1988).

Coleman, this Court held that UHS as a private non-profit corporation, while "not entirely free of any vestige of state supervision," has sole and exclusive control over personnel decisions, and thus the requisite nexus between the state and termination of UHS employee was not present for purposes of a § 1983 action.

Although *Coleman* dealt with a challenged employee-termination decision, the situation here appears analogous. *Greco v. Orange Mem. Hosp. Corp.*, 513 F.2d 873 (5th Cir. 1975), *cert. denied*, 423 U.S. 1000 (1975), sheds additional light on this point.[2] In *Greco*, the plaintiff brought a § 1983 action against a private corporation that operated a hospital in a publicly-owned building leased from the county, alleging that the hospital's policy prohibiting non-therapeutic abortions was unconstitutional. There was evidence that, *inter alia*, the county built the building and owned the land and building which housed the hospital; the private hospital corporation leased the land and hospital from the county for one dollar per year and was bound under the provisions of the lease to operate the hospital as a non-profit institution and to furnish general public medical and surgical care; and the lease required the private corporation to submit annual audits to the county and to furnish the county with any information which it felt necessary to inform the citizens about the operation and financial condition of the institution. *Id.* at 876.

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), decisions of the Fifth Circuit made prior to October 1, 1981, were made binding precedent on the Eleventh Circuit.

Nevertheless, the Fifth Circuit affirmed the district court's dismissal on the basis that the plaintiff failed to establish state action for purposes of § 1983. The private, non-profit hospital corporation was not a state actor as to conduct of medical policy that prohibited elective abortions where the hospital's board of directors had *exclusive control of that policy under the terms of a lease agreement, and neither the county nor state had sought to regulate or influence that policy and had remained neutral with respect to implementation of that policy. Id.* at 880-81. "The involvement of the County [was] not sufficiently related to [implementation of the hospital's medical policy] to justify the imposition of Constitutional restrictions upon the daily business of the hospital." *Id.* at 882.

Greco is applicable to the circumstances here; the critical fact remains that under the lease agreement, UHS has all the rights, title, and interest in the ambulance service, and it also has exclusive control over personnel management. Furthermore, as previously noted, the Georgia Supreme Court determined in *Richmond County Hosp. Auth., supra,* that RCHA and UHS are separate and distinct entities in the eyes of the law, despite some overlapping personnel at the highest level. *Richmond County Hosp. Auth.,* 336 S.E.2d at 565.

There is no sufficient nexus between RCHA and the actions of UHS ambulance service personnel in this case to create § 1983 liability for UHS as a state actor. Furthermore, the state in the form of RCHA cannot be said to have coerced or encouraged UHS regarding UHS operation of the ambulance service. Finally, UHS as a private hospital corporation does not exercise powers traditionally reserved exclusively to the state. *See Greco,* 513

F.2d at 882. Therefore, there is no state action present with regard to Defendant UHS.

(b) Defendant ambulance attendants Johnson and Sheppard contend that the treatment rendered by these individuals involved the exercise of independent medical judgment, and that there was no nexus between the state and that treatment. Defendants cite Supreme Court decisions which hold that particular exercises of independent professional judgment do not involve state action. *See Blum v. Yaretsky*, 457 U.S. 991 (1982) (decisions of physicians and administrators of privately owned and operated nursing home to transfer Medicaid patients not state action); *Polk County v. Dodson*, 454 U.S. 312 (1981) (public defender not state actor when performing lawyer's traditional functions as counsel to criminal defendant). In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), "[t]he Court suggested that [a] private party's challenged decisions could satisfy the state-action requirement if they were made on the basis of some rule of decision for which the State is responsible." *West v. Atkins*, 487 U.S. 42, 52 n. 10, 108 S.Ct. 2250, 2257 n. 10, 101 L.Ed.2d 40 (1988). Where the decisions were based on independent professional judgments and not subject to state direction, there was no state action. *Id.*

If these ambulance attendants' decisions regarding the care of Ms. Williams were the exercise of independent medical judgment, there was no state action insofar as their relationship with their employer UHS is concerned. Even if those decisions were made pursuant to the customs, policies, and procedures of their employer UHS, there was no state action, because those customs, policies, and procedures regarding the ambulance service were

those of a private entity (UHS) and not those of a governmental body (RCHA).

Plaintiffs argue another ground for finding state action by Defendants Johnson and Sheppard; that is, the ambulance attendants were allegedly acting under color of state law when they took custody of Plaintiff and transported her to the hospital at the request of the Sheriff's Department. Plaintiffs assert that there was state action because the ambulance service was in effect assisting police in the apprehension, transportation, and detention of a mental patient pursuant to a court order, citing *West v. Atkins*, 487 U.S. 42 (1988), as the authority for support of their proposition. In *West*, the determination that there was state action by a private physician hinged upon the state's affirmative Eighth Amendment obligation to provide medical care to convicted prisoners, and the state's delegation of that particular function to the physician under contract.

In this case, Ms. Willis [sic] was not a convicted prisoner, but she was a detainee, since she was taken into custody by Richmond County Sheriff's Department deputies and then transferred in handcuffs to the care of the UHS ambulance attendants. Under the Fourteenth Amendment, the State has an obligation to provide medical care that is not deliberately indifferent to the serious medical needs of detainees who have been injured while being apprehended by the police. *Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983). Given this affirmative obligation, and the transfer of Ms. Williams in handcuffs from Sheriff's deputies to UHS personnel, it could be said there was state action present in the actions of Defendants Johnson and Sheppard.

3. Nevertheless, even though state action arguably may have been present in the acts of Defendants Johnson and Sheppard, their treatment of Plaintiff did not violate the constitutional standard for medical care in this instance. First, there was no Eighth Amendment violation, because the protection afforded by that amendment does not apply to persons not convicted of a crime. *Revere*, 463 U.S. at 244. Although Plaintiff asserts an Eighth Amendment claim "[o]ut of an abundance of caution" because "there is always the possibility that the Supreme Court will rule differently," this Court must apply existing law. Accordingly, the source of Plaintiff's right to medical care as a detainee arises out of the Fourteenth Amendment, not the Eighth Amendment.

There is a dispute over how aware Johnson and Sheppard were, or should have been, of the nature of Ms. Williams's injury at the scene, and Plaintiffs assert that Johnson's and Sheppard's "fail[ure] to detect the wound or to stabilize here spine in the event there was such a wound" constituted a "complete disregard for the applicable standard of care. . . . "

The applicable standard is care which does not show deliberate indifference to serious medical needs of the detainee. *Id.* "[D]eliberate indifference to serious medical needs . . . constitutes the 'unnecessary and wanton infliction of pain'. . . . " *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

> [A]n inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a [health care provider]

> has been negligent in diagnosing or treating a medical condition does not state a valid [constitutional] claim of medical mistreatment. . . .

Id. at 105-06.

Plaintiff's § 1983 claim against Johnson and Sheppard must fail here. Whatever degree of awareness Defendants Johnson and Sheppard had, or should have had, regarding the nature of Ms. Williams's injury, the care that was afforded to Ms. Williams did *not* sink to the level of deliberate indifference to a serious medical need. Plaintiff was not refused treatment nor was access to treatment denied or delayed. To the contrary: once Ms. Williams was removed from the house, she was attended by trained medical technicians and taken immediately via ambulance to a nearby acute-care facility where she could be treated by physicians. As in *Revere,* the constitutional obligation was fulfilled by *"seeing that [the detainee] was taken promptly to a hospital that provided the treatment necessary for [her] injury." Revere,* 463 U.S. at 245 (emphasis added). Johnson and Sheppard may or may not have acted negligently in their assessment and care of the patient; that is a question for another day and another tribunal. However that question might be resolved, these Defendants' actions did not violate the Fourteenth Amendment.

B. Motion for Summary Judgment by Defendants Richmond County, Sheriff Charles Webster, Captain Ray Myers, and North River Insurance.

In essence, Plaintiffs argue that Defendant Myers, by deploying the SWAT team, effected an unreasonable

seizure of Ms. Williams in violation of the Fourth Amendment, and that he is liable for damages that occurred as a proximate result of this unconstitutional conduct.[3] Plaintiffs further argue that Defendant Richmond County is liable for the conduct of Defendant Myers to the extent that county custom, policy, or practice was a "moving force" behind the alleged unconstitutional action of Myers, or to the extent that his actions represented official county policy.[4] Plaintiffs also argue that to the extent Sheriff Webster was involved at all in the implementation of policies and procedures which led to an unreasonable seizure of the Plaintiff, or to the extent his deliberate indifference led to the same, the County should be held liable as a matter of law for his conduct, citing this Court's decision in *Sammons v. McDonald*, No. CV189-199 (S.D. Ga. Jan. 17, 1991) (holding Sheriff of Richmond County is final decisionmaker for purposes of establishing County liability under § 1983).

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[3] Plaintiffs' Brief in Opposition to Motion for Summary Judgment by Richmond County, Sheriff Charles Webster, Captain Ray Myers, and North River Ins. Co., at 34 n.7.

> The unreasonable seizure alleged . . . occurred when Captain Myers ordered the SWAT team to go into the house, restrict Mrs. Williams' movement, and physically restrain her under circumstances in which it was foreseeable, if not virtually certain, that she would be shot. The shooting is but a consequential damage which proximately resulted from the seizure. . . .

Id. at 11-12.

[4] Plaintiffs' Brief in Opposition to Motion for Summary Judgment by Richmond County, Sheriff Charles Webster, Captain Ray Myers, and North River Ins. Co., at 34 n.7.

Deputy Steve Buchanan, who fired the wounding shot, is no longer a defendant in this case, having been voluntarily dismissed with prejudice pursuant to a consent order on the grounds of qualified immunity. Plaintiffs contend that his actions "are not the basis of this lawsuit." Rather, Plaintiffs' theory of the case apparently is that Ms. Williams's Fourth Amendment rights were violated because Captain Myers allegedly deployed the SWAT team unnecessarily; the tactics used by the SWAT team in removing Ms. Williams from the house were inappropriate; and that customs, policies, and procedures of Richmond County and its Sheriff led to this unreasonable seizure.

The Fourth Amendment guarantees citizens the "right to be secure in their persons . . . against unreasonable . . . seizures" of the person. U.S. Const. amend. IV. "A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen'. . . . " *Graham v. Connor,* 490 U.S. 386, 395 n.10 (1989). The reasonableness inquiry in a Fourth Amendment context "is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. The proper perspective is that of a "reasonable officer on the scene. . . . " *Id.* at 396. Twenty-twenty hindsight vision is inappropriate in Fourth Amendment reasonableness analysis. *Id.*

Merely *deploying* the SWAT team was not unreasonable seizure which raises constitutional problems. Even if

law enforcement officials here arguably erred in judgment when they decided on a plan that employed potentially deadly force, such evidence falls short of a showing that there was no plausible basis in this instance for the officials' belief that this degree of force might be necessary. *See Whitley v. Albers*, 475 U.S. 312, 323 (1986). In *Whitley*, a prison inmate brought an Eighth Amendment claim under 42 U.S.C. § 1983 against prison officials who worked out a plan to free an officer held hostage by inmates. The hostage was held on an upper tier of cellblocks, and the security manager planned to climb the stairs unarmed in an attempt to free the hostage. The security manager ordered one of the officers to fire a warning shot and then to shoot low at any inmate climbing the stairs to the upper tier. After the plaintiff inmate started up the stairs, one of the officers, after firing a warning shot, shot the plaintiff in the knee. *Whitley*, 475 U.S. at 314-17. The Court held that the prison officials had not acted with "obduracy and wantonness" and there was no violation of the prisoner's Eighth Amendment rights. *Id.* at 322-26, 106 S.Ct. at 1085-87.

Although the question presented here is whether an official's actions were "objectively unreasonable" in violation of the Fourth Amendment, *Whitley*'s distinction between failing to meet the applicable constitutional standard of conduct and committing "ordinary errors of judgment" is appropriate. *See id.* at 322. As in *Whitley*, officials here "had no way of knowing what direction matters would take if they continued to negotiate or did nothing, but they had ample reason to believe that these options presented unacceptable risks." *Id.* at 323. There was evidence that Ms. Williams presented a substantial risk of

imminent harm to herself and others. She had threatened to shoot deputies who attempted to serve a court order for evaluation. She had swung or stabbed a butcher knife at one officer, with some (albeit minor) degree of success in injuring him. Attempts at negotiating a peaceful solution had proved fruitless.

As the Supreme Court extended deference to the decision of the prison officials in *Whitley*, this Court does so to that of the Richmond County officers here. This deference "does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice." *Id.* at 322. Therefore, although Plaintiffs submitted affidavits in support of their argument that use of the SWAT team was unreasonable, "[a]n expert's after-the-fact opinion that danger was not 'imminent' in no way establishes that there was no danger, or that a conclusion by the officers that it *was* imminent would have been wholly unreasonable." *Id.* at 323 (emphasis in original). At most this evidence establishes that the officials arguably may have erred in judgment. *Id.* Regardless of whether it was Captain Myers or some other officer who was actually responsible for mobilizing the Special Weapons and Tactics team in this instance, it cannot be said that merely deploying a SWAT team was objectively unreasonable under the circumstances.

What of the tactics utilized by the SWAT team? Deadly force was not the first option chosen once the SWAT team arrived on the scene. Instead, tear gas was used in an effort to force Ms. Williams out of the room, and officers attempted to subdue her by tripping her as

she left the room. It cannot be said that the Richmond County officers' attempts to resolve the situation were objectively unreasonable means in circumstances where Ms. Williams herself had already threatened and attempted to use deadly force. *Only after she advanced with a weapon toward an officer at close quarters was potentially deadly force finally applied against her.*[5] Where officers acted pursuant to the request of a family member, who voluntarily admitted the officers into the home, and officers observed the Plaintiff's conduct to be irrational – even violent – and took her into custody using no more force than the circumstances warranted, there has been no deprivation of the Plaintiff's federally secured rights. *Joyce v. Ferrazzi,* 323 F.2d 931, 933 (1st Cir. 1963).

There having been no deprivation of Ms. Williams's Fourth Amendment rights by Defendant Ray Myers in his utilization of the SWAT team, there is no need to reach issues of the customs, policies, and procedures of Richmond County or the actions of its Sheriff as decision-maker. Plaintiffs' § 1983 claim against Defendants Richmond County, Sheriff Charles Webster, and Captain Ray Myers must fail.

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[5] Although the actions of the deputy who fired the wounding shot are not at issue here, it should be noted that where an officer has probable cause to believe that a person poses a threat of serious physical harm, either to the officer or to others, or where an officer has been threatened with a weapon, it is not constitutionally unreasonable to use deadly force where necessary to prevent the person from harming others. *See Tennessee v. Garner,* 471 U.S. 1, 11 (1985).

CONCLUSION

Accordingly, the Motion for Summary Judgment by Defendants Richmond County Hospital Authority, University Health Service, Tina Johnson, and Jim Sheppard is hereby GRANTED as to all federal claims under 42 U.S.C. § 1983. There being no other federal claims against these Defendants, pendent state law claims asserted against these defendants are DISMISSED without prejudice for want of jurisdiction.

The Motion for Summary Judgment by Defendants Richmond County, Sheriff Charles Webster, Captain Ray Myers, and North River Insurance is hereby GRANTED as to all federal claims under 42 U.S.C. § 1983. There being no other federal claims against these defendants, pendent state law claims asserted against these defendants are DISMISSED without prejudice for want of jurisdiction.[6]

The Clerk of Court is directed to enter judgment in favor of all Defendants as to the federal claims brought under 42 U.S.C. § 1983 and dismiss the state law claims against all defendants. The Clerk is further directed to tax costs against the Plaintiffs and close the case.

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[6] Plaintiffs had filed a Cross-Motion for Partial Summary Judgment against Defendants Richmond County, Sheriff Charles Webster, and Captain Ray Myers. Summary Judgment having been granted for these defendants on all federal claims, and all state-law claims against these defendants having been dismissed, Plaintiffs' Cross-Motion for Partial Summary Judgment is now MOOT.

ORDER ENTERED at Augusta, Georgia, this 26th day of August, 1992.

/s/ Dudley H. Bowen, Jr.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUN 24 1994
OFFICE OF THE CLERK

No. 93-1977

In The

Supreme Court of the United States

OCTOBER TERM, 1993

MARY WILLIAMS AND JAMES WILLIAMS,

Petitioners,

v.

RICHMOND COUNTY, GEORGIA, SHERIFF CHARLES WEBSTER, CAPTAIN RAY MYERS, TINA JOHNSON, JIM SHEPPARD, AND UNIVERSITY HEALTH SERVICES INC. d/b/a UNIVERSITY HOSPITAL AMBULANCE SERVICE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a law enforcement officer can be held liable under 42 U.S.C. Section 1983 for strategic decisions in executing a lawful order of a state court which resulted in a tragic but justifiable shooting of the suspect.

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STATEMENT OF THE CASE

In order for this Honorable Court to appropriately determine whether this case is worthy of its consideration, a brief factual narrative as well as a brief procedural history of this case is needed. Initially it should be pointed out that the petitioner's comparison of this case to the recent tragedy in Waco, Texas is to say the least a gross exaggeration.

This case began on November 16, 1989, when the two brothers of the petitioner Mary Williams submitted affidavits to the Judge of the Probate Court of Richmond County seeking an order having their sister apprehended by law enforcement officials and committed to the Georgia Regional Hospital. In the affidavits, her brothers swore that their sister presented a substantial risk of imminent harm to herself and others.

Subsequent to the order being issued, two deputies from the Richmond County Sheriff's Department arranged to meet her brothers at their residence to allow them entry into the house in order to arrest and transport petitioner to the hospital. Prior to the officers arriving on the scene, the petitioner Williams assaulted one of her brothers with a brick.

Upon the officers' arrival, Mrs. Williams had locked herself in a back bedroom of the house. She continually cursed the officers and threatened to shoot them. Eventually the door was opened, and after a discussion with the petitioner, she produced a butcher knife and attempted to stab one of the officers. The officer escaped with only a minor injury. For the next five hours Mrs. Williams

remained in the bedroom with the door locked and barricaded with furniture. During this approximate 4 or 5 hour time interval, the Sheriff's Department did everything humanly possible to talk Mrs. Williams into coming out of the room and voluntarily going to the hospital. Several officers spoke to her, her brothers spoke to her, the Sheriff's Department trained hostage negotiator talked to her, and the department even arranged for her minister to come to the house and speak to her. However all these efforts were to no avail.

At some point during this ordeal, the Richmond County Sheriff's Department SWAT Team was called to the scene to wait in the event they were needed. After approximately 5 hours, the department's hostage negotiator reported to Capt. Wilhelm who was on the scene and Chief Deputy Ronald Strength who was at the Sheriff's Department headquarters that, in his opinion, Mrs. Williams was not coming out of the room voluntarily. At that time Chief Deputy Strength instructed Capt. Myers, who was in charge of the SWAT Team, to use the SWAT Team to remove Mrs. Williams from the house. By this time the SWAT Team had been on the scene for approximately 2 hours. After much discussion, the SWAT Team came up with a plan to remove Mrs. Williams from the room which in the opinion of the officers involved the least risk to the officers as well as to Mrs. Williams. The plan was to put tear gas in the window of the bedroom where Mrs. Williams was barricaded, to lock all the doors in the hallway leading to the bedroom, and place a coffee table immediately outside the door of the bedroom. The hope was that Mrs. Williams being disoriented by the tear gas would come out of the room, trip over the coffee table

and the officers would be able to disarm her and handcuff her with little or no resistance or struggle. However in the event that she eluded the coffee table, the members of the SWAT Team who were placed inside the house were instructed to use their batons to attempt to disarm Mrs. Williams and to only use deadly force as a last resort.[1]

When the tear gas was placed in the back bedroom, Mrs. Williams removed the barricade, opened the door, and eluded the coffee table. She immediately zeroed in on the first officer she saw and attacked him with the knife. The officer in question was moving backward while using his baton to block her thrusts with the knife. When it appeared that the officer had stumbled and was about to be killed by Mrs. Williams, Deputy Steve Buchanan, a member of the SWAT Team fired one round from his revolver striking Mrs. Williams and ending the ordeal.

On May 9, 1990, the petitioners filed this civil rights action with pendant state law claims in the United States

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[1] Contrary to the representations of the petitioner in their petition, Capt. Ray Myers did not devise this plan within minutes of being on the scene. Capt. Myers did not make the decision to utilize the SWAT Team to remove Mrs. Williams from the bedroom but was ordered to do so by Chief Deputy Strength after 5 hours of attempting to talk Mrs. Williams out of the bedroom. Most importantly, contrary to the representations of the petitioners in the petition, Capt. Myers did not tell the SWAT Team to shoot Mrs. Williams if she tried to use the knife. In fact he specifically ordered his officers to use the batons to attempt to disarm Mrs. Williams and to only use their firearms as a last resort.

District Court for the Southern District of Georgia. Initially Deputy Steve Buchanan of the Richmond County Sheriff's Department, who fired the shot that struck Mrs. Williams, was named as a defendant. After a little over a year of discovery, the petitioners herein, apparently realizing that the shooting of the petitioner Mary Williams by Deputy Buchanan was justifiable and did not constitute a violation of her civil rights dismissed Buchanan with prejudice and added Capt. Ray Myers as a defendant pursuant to a consent order. The petitioners' theory of the case then changed. Their contention then was that the strategic decisions made by Capt. Myers in utilizing the SWAT Team constituted an unreasonable seizure under the 4th Amendment.

However, the District Court disagreed with the petitioners and on August 26, 1992, the District Court granted the defendants' motions for summary judgment on all federal claims and dismissed without prejudice all pendant state law claims. The District Court held that the mere fact that the SWAT Team was deployed did not render the actions of the Sheriff's Department objectively unreasonable under the circumstances. The District Court further held that the defendants' attempts to resolve the situation were not objectively unreasonable under all the circumstances as a matter of law. *Williams v Richmond County, Georgia,* 804 F.Supp. 1561, 1570 (S.D. Ga. 1992)[2]

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[2] The District Court did not apply an 8th Amendment standard in this case as represented by petitioners. The District Court merely analogized the factual situation in this case to the factual situation in *Whitley v Albers,* 475 U.S. 312, 106 S.Ct. 1078 (1986). *Williams v Richmond County, Georgia,* 804 F.Supp. 1561, 1569-70 (S.D. Ga. 1992).

Thereafter an appeal was taken by the petitioners to the 11th Circuit Court of Appeals. After briefing the case to the Court of Appeals and prior to oral argument, the 11th Circuit Court of Appeals decided the case of *Wilson v Northcutt*, 987 F.2d 719 (11th Cir, 1993), in which the 11th Circuit held that the plaintiff was not seized by the defendant law enforcement officers in a factual situation very similar to the case at hand. Thereafter the respondents petitioned the 11th Circuit Court of Appeals for permission to file a supplemental brief concerning the issue as to whether a 4th Amendment seizure occurred of Mrs. Williams by Capt. Myers. The 11th Circuit granted leave to file the supplemental brief as well as allowing the petitioners to file a reply brief on the same issue. On March 8, 1994, the 11th Circuit Court of Appeals issued a per curiam decision pursuant to 11th Circuit Rule 36-1 affirming the district court's order.[3]

ARGUMENT AND CITATION OF AUTHORITY

I. The petitioner's petition does not meet the requirements under Rule 10 for consideration by this Court.

The respondents herein respectfully submit to this Court that this case does not meet the requirements of Rule 10 of the Rules of the Supreme Court of the United States for granting a petition for a writ of certiorari. This case is neither a case of first impression nor does it

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[3] 11th Circuit Rule 36-1 provides for affirmance without opinion when the Court determines that a summary judgment is supported by the record and an opinion would have no precedential value.

represent a legal issue in which there is a conflict among the Circuit Courts of Appeals.

Since it was clear that Deputy Steve Buchanan, who actually shot the petitioner Mary Williams, did not commit a constitutional violation against Mrs. Williams pursuant to this Court's decisions in *Tennessee v Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985) and *Graham v Conner*, 490 U.S. 386, 109 S.Ct. 1865 (1989), the petitioners focus their attack upon Capt. Ray Myers who was in charge of the SWAT Team. However Capt. Ray Myers did not make the decision to utilize the SWAT Team but merely followed the orders of his superiors in utilizing the SWAT Team. Capt. Myers merely made the decision as to how the SWAT Team was going to remove Mrs. Williams from the bedroom once they were ordered to do so. In effect, the petitioners contend that the respondent Myers violated Mrs. Williams rights under the 4th Amendment by using improper strategic methods of extracting her from the bedroom.

However several Circuit Courts of Appeals have dealt with the issue where an officer's tactics in responding to a particular situation is questioned. Each time presented with this issue, the Circuit Courts of Appeals have ruled contrary to the arguments of petitioners.

The following cases all held in one form or another that the violation of standard police procedures or universally accepted police practices by a law enforcement officer does not render an otherwise lawful shooting a constitutional violation. *Young v City of Killeen, Texas*, 775 F.2d 1349 (5th Cir, 1985); *Fraire v City of Arlington*, 957 F.2d 1268 (5th Cir, 1992); *Greenidge v Ruffin*, 927 F.2d 789

(4th Cir, 1991); *Smith v Freeland*, 954 F.2d 343 (6th Cir, 1992).

To the knowledge of the undersigned counsel, there are no cases which hold contrary to the above referenced circuit court opinions.

In an effort to peak this court's interest in this case, the petitioners contend that the lower court's decision in this case turned on the moment that the petitioner Mary Williams was "seized". In support of this the petitioner states that "the Trial Court's position is that the seizure began and ended with the justified, split second firing of the deputy's gun . . . ". (Petition for Writ of Certiorari at page 9) However that is simply not the case. The Trial Court's decision did not even discuss when the seizure of Mary Williams began or concluded. What the Trial Court stated in support of its decision holding that Capt. Myers did not commit a 4th Amendment unreasonable seizure of Mrs. Williams was as follows:

> It cannot be said that the Richmond County officers' attempts to resolve the situation were objectively unreasonable means in circumstances where Mrs. Williams had already threatened and attempted to use deadly force. **Only after she advanced with a weapon toward an officer at close quarters was potentially deadly force finally applied against her.** Where officers acted pursuant to the request of a family member who voluntarily admitted the officers into the home, and officers observed the plaintiff's conduct to be irrational – even violent – and took her into custody using no more force that the circumstances warranted, there has been no deprivation of the plaintiff's federally secured

rights. *Williams v. Richmond County, Georgia,* 804 F.Supp. 1561, 1570 (S.D. Ga. 1992) (emphasis not added)

Therefore the Trial Court's decision did not turn on the issue of when Mrs. Williams was seized or if she was seized. Although that particular issue was addressed by supplemental brief to the 11th Circuit of the Court of Appeals, since there is no opinion issued by the 11th Circuit Court of Appeals, it cannot be said that the decisions below turned on when Mrs. Williams was seized.

The respondents herein submit to this Honorable Court that when and by whom Mrs. Williams was seized only determines the standard to be applied to the facts of this case, i.e., a 4th Amendment objectively unreasonable standard or a "shock the conscience" 14th Amendment substantive due process standard. Utilizing either standard, the respondents were entitled to judgment in their favor. This issue will be discussed more fully herein.

II. The District Court was correct in granting summary judgment to the respondents and the 11th Circuit Court of Appeals was correct in affirming said order.

The respondents respectfully submit to this Court that the order of the District Court granting summary judgment to these defendants was entirely correct and legally appropriate and the 11th Circuit Court of Appeals was correct in affirming the District Court.

Although the petitioners in their petition to this Honorable Court place great weight on the fact that their expert witnesses testified that the respondent Myers

acted improperly, upon close examination there were very minute differences between the opinions of petitioners' experts and the actions of the respondent.

The expert witnesses of petitioner found fault with the commander of the SWAT Team, Capt. Ray Myers, making the decision to utilize the SWAT Team to deal with Mrs. Williams. They opined that decision should be made by a neutral superior who is not a member of the SWAT Team. However, that is exactly what occurred in this case. Capt. Myers, the commander of the SWAT Team did not make the decision to utilize the SWAT Team. He merely approved the plan as to how the SWAT Team was going to extricate Mrs. Williams once his superiors made the decision to utilize the SWAT Team. The decision to utilize the SWAT Team was made by Chief Deputy Ronald Strength after consultation with the department's hostage negotiator and Capt. Wilhelm who were at the scene.

The petitioners experts also criticized the Sheriff's Department for not bringing in a mental health professional to talk to Mrs. Williams. However instead of a mental health professional, the Sheriff's Department brought in Mrs. Williams' minister instead. However all efforts to talk Mrs. Williams out of the locked and barricaded bedroom were to no avail even though numerous people spoke to her. The only response from Mrs. Williams was curse words and threats on the lives of the officers.

Although petitioners' experts did indicate that the SWAT Team should have waited longer, they did not give any opinion as to how long the Sheriff's Department

should have waited. The petitioners' experts further indicated that once the decision was made to use the SWAT Team to remove Mrs. Williams, the officers should have forced Mrs. Williams out of the house completely instead of merely out of the bedroom into the hall before trying to subdue her. The experts continued to testify that once she was outside and if it appeared that she was going to seriously injure one of the officers, Mrs. Williams could have been shot by a sniper utilizing a high powered rifle.

Therefore the only differences between the actions and strategies of Capt. Myers and the opinions of petitioners' experts were the use of a minister as opposed to a mental health professional and forcing Mrs. Williams out of the bedroom into the hall as opposed to completely out of the house. The respondent submits to the Court that this is insufficient to convert this action into a violation of Mrs. Williams' constitutional rights considering that she was only shot when it appeared that she was going to be successful in an effort to kill one of the officers.

When one examines the petitioners' position in this case, it is readily apparent that they advocate a position that this Court should hold that once a suspect refuses to yield to the authority of an officer and threatens deadly force if the officer attempts to execute a valid warrant, then the officer has absolutely no choice but to wait until the suspect changes his or her mind. Because, in the opinion of the petitioners, if the officer does attempt to execute the valid warrant and the suspect does resist using deadly force as promised, the officer cannot respond with deadly force because the suspect's resistance was "foreseeable". Such a position is not the law and simply cannot be the law.

In addition to the above reasons, the respondent Ray Myers submits that his liability is effectively foreclosed by this Court's decision in *City of Los Angeles v Heller*, 475 U.S. 796, 196 S.Ct. 1571 (1986).

In *Heller*, this Honorable Court held that if the individual officer did not violate the plaintiff's constitutional rights, then there can be no liability of the supervisory personnel. Since it is undisputed that Deputy Steve Buchanan who shot Williams did not inflict any unconstitutional injury upon her, then it logically follows that no other person or entity can be liable under a civil rights theory for petitioner's injuries. The District Court noted in its order granting summary judgment to these respondents the undeniable conclusion that Steve Buchanan did not violate Mrs. Williams constitutional rights. *Williams v Richmond County, Georgia, supra* at page 1570, fn. 5. The respondents also submit to this Court that any actions or omissions on behalf of Capt. Myers cannot be the "moving force" behind any alleged constitutional violation of Mrs. Williams. See generally *City of Canton, Ohio v Harris*, 109 S.Ct. 1197 (1989). After all, it was not Capt. Myers' actions which caused Deputy Buchanan to shoot Mrs. Williams. It was the actions of Mrs. Williams in attempting to kill a law enforcement officer which resulted in her being shot.

With regard to the "seizure" issue as eluded to in the preceding section of this brief, the respondents herein relied below in part on the recent decision of the 11th Circuit in *Wilson v Northcutt*, 987 F.2d 719 (11th Cir, 1993). In Wilson, officers were attempting to serve a bench warrant on plaintiff's decedent when she locked herself in a bathroom. The officers gained entry to her residence

by way of an open window and after determining she was in the bathroom attempted to force their way inside to arrest her. In response, plaintiff's decedent committed suicide with a firearm. The 11th Circuit Court of Appeals relying upon this Court's decision in *California v Hodari D.*, 111 S.Ct. 1547 (1991), held that the officers did not "seize" the plaintiff's decedent within the meaning of the 4th Amendment. Wilson at page 721-22. The Court then analyzed the case under a 14th Amendment substantive due process "shock the conscience" standard as set out in *Rochin v California*, 342 U.S. 165, 72 S.Ct. 205 (1952).

The respondents argued in the 11th Circuit that just as the plaintiff's decedent in Wilson was not seized, Mary Williams was not seized by the actions of Capt. Myers and therefore the case should be analyzed under a "shock the conscience" standard under the 14th Amendment.

However the decision of the District Court and apparently the decision of the 11th Circuit Court of Appeals did not turn on this issue. In any event, the respondent submits that the District Court was entirely correct in granting summary judgment to this respondent under either an "objectively unreasonable" standard under the 4th Amendment or a "shock the conscience" standard under the 14th Amendment.

The actions of Capt. Ray Myers did not violate any constitutional right of the petitioner Mary Williams. Capt. Ray Myers merely responded to the scene at the request of his superiors. After waiting several hours with his SWAT Team, while numerous efforts were taken to convince Mrs. Williams to come out voluntarily, he was

ordered to utilize the SWAT Team to remove Mrs. Williams. Should Capt. Myers have disregarded the order and waited longer in the hope that she would have voluntarily surrendered? It must be remembered that Mrs. Williams' brothers had both sworn in affidavits before the Probate Court that she presented not only a risk to others but also to herself. Waiting any longer could have resulted in a suicide just as the *Wilson* case resulted in a suicide. See *Taylor v Watters,* 655 F.Supp. 801, 807 (E.D. Mich. 1987) However, that is all speculation and it was not Capt. Myers who made that decision. He was ordered to use the SWAT Team to remove Mrs. Williams. Once he was ordered to do so, a plan was devised that under the circumstances would result in the least risk of harm not only to Mrs. Williams but also to the officers. All the officers with the SWAT Team were instructed to use their batons in an effort to disarm Mrs. Williams. In fact, the baton was used in an effort to disarm Mrs. Williams and it was only when it appeared the officer was going to fall and be killed by Mrs. Williams, when the injury producing shot was fired.

It is largely undisputed that all officers with the SWAT Team who were inside the house risked their life in an effort to carry out a lawful order of a state court to arrest and commit Mrs. Williams. The officer who was blocking the blows of Mary Williams could easily have been seriously injured or killed.

Even utilizing the strategies of plaintiffs' experts, it is just as likely that Mrs. Williams would have been shot but by a sniper with a high powered rifle instead of by Deputy Buchanan. It should also be pointed out that the

experts that petitioners relied upon were not their original experts. A previously employed expert of plaintiff was deposed in this case. That particular expert opined that the officers should have knocked down the door of the bedroom, stormed the room and taken Mrs. Williams as opposed to forcing her outside the room. This particular expert withdrew from the case shortly after his deposition and two new experts were hired by the petitioners. It is therefore apparent that there was even a dispute as to the appropriate strategies among the petitioners' paid experts. There were probably a multitude of different ways this situation could be handled. Simply because a well reasoned plan went awry is not sufficient to impose civil rights liability upon Capt. Myers.[4]

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[4] Contrary to the representation of petitioners in their petition, the Court in *Kjorlie v Lundin*, 765 F.Supp. 671 (D. Kan. 1991), did not hold that the mere show of force by a SWAT Team, even without physical contact or injury, can give rise to a cause of action under 42 U.S.C. Section 1983. The Court in *Kjorlie*, merely ruled upon the 11th Amendment immunity and qualified immunity of the state defendants and did not address the issue represented by petitioners. (See page 10 of petition for writ of certiorari).

CONCLUSION

For the within and foregoing reasons, these respondents respectfully request this Court to deny the petitioners' petition for a writ of certiorari.

Respectfully submitted this 24th day of June, 1994.

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(3)

Supreme Court, U.S.
FILED
JUL 6 1994
OFFICE OF THE CLERK

No. 93-1977

In The

Supreme Court of the United States

October Term, 1994

MARY WILLIAMS and JAMES WILLIAMS,

Petitioners,

v.

RICHMOND COUNTY, GEORGIA, SHERIFF CHARLES WEBSTER, CAPTAIN RAY MYERS, TINA JOHNSON, JIM SHEPPARD, and UNIVERSITY HEALTH SERVICES, INC. d/b/a UNIVERSITY HOSPITAL AMBULANCE SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether employees of a non-profit, private hospital, who are not employed nor under contract with the state, nor acting pursuant to instructions or under the supervision of any state entity, who render emergency care to a pretrial detainee and exercise independent medical judgment, are state actors for purposes of 42 U.S.C. § 1983.

Whether the conduct of emergency medical technicians who examine, treat and transport a patient via ambulance to a nearby private acute-care hospital and who do not discover that the patient has been shot due to a combination of the patient's obesity, the fact that her hands are cuffed behind her back and because the patient continues to thrash around, is a violation under the Fourteenth Amendment of the United States Constitution.

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STATEMENT OF THE CASE

On November 20, 1989, deputies from the Richmond County Sheriff's Department arrived at 1121 Turpin Street, Augusta, Georgia, with an order from the Probate Judge of Richmond County, Georgia. The order granted a petition for the psychological evaluation of Petitioner Mary Williams at Georgia Regional Hospital. The petitioners who sought the order were Eddie Burley, Jr., and Prince Albert Burley, which individuals are Mary Williams' brothers.

Mary Williams refused to peaceably cooperate with the deputies. Instead, Mary Williams barricaded herself in a back room of the house and threatened to shoot the deputies. When the deputies attempted to force their way into the room, Mary Williams stabbed Deputy Jessie Jackson. As a result, deputies called for back-up and officers experienced in negotiation strategies.

After numerous attempts to negotiate Mary Williams' surrender to authorities, deputies fired a tear gas canister into the bedroom in which Mary Williams had barricaded herself. Shortly thereafter, Mary Williams, while armed with the knife, exited the bedroom and "rushed" Investigative Officer Gregory Meagher. The police officer tripped and lost his balance. Fearing for the life of his fellow officer, Officer Steve Buchanan discharged a single gunshot which struck Mary Williams. After disarming her and handcuffing her arms behind her back, Richmond County deputies carried Mary Williams out of the house to a waiting University Hospital ambulance.

During the time while the police were procuring Mary Williams' surrender, University Hospital ambulance attendants, Tina Johnson and Jim Sheppard, remained outside of the house. The ambulance personnel were standing by the ambulance which was parked about two houses down the street from the house in which Mary Williams barricaded herself.

After Mary Williams was brought out of the house by deputies of the Richmond County Sheriff's Department, University Hospital Ambulance attendants, Tina Johnson and Jim Sheppard, loaded Mary Williams into the waiting ambulance and proceeded to University Hospital. While enroute to the hospital, Tina Johnson attempted to examine Mary Williams. Because of the combination of Mary Williams' obesity, the fact that her hands were cuffed behind her back, and because the patient continued to thrash around, Tina Johnson's examination revealed no injuries. Neither of the ambulance personnel learned that Mary Williams had been shot until after arrival at the hospital.

University Health Services, Inc., is a private, non-profit corporation and, at all times, Tina Johnson and Jim Sheppard were employees of University Health Services, Inc. Tina Johnson and Jim Sheppard were not under contract with the state, nor were they under any supervision of the state. At all times relevant, Tina Johnson and Jim Sheppard used their independent medical judgment in rendering care and treatment to the patient.

On May 9, 1990, Petitioners Mary and James Williams initiated this action by filing suit in the United States

District Court for the Southern District of Georgia. Petitioners' Complaint alleged, *inter alia*, that Mary Williams had been unreasonably seized in violation of the Fourth Amendment and was subsequently deprived of medical attention in violation of the Fourteenth Amendment. Petitioners also included various pendent state claims.

On January 24, 1992, Tina Johnson, Jim Sheppard, Richmond County Hospital Authority and University Health Services, Inc., filed a motion for summary judgment on the following grounds:

a. Respondent Richmond County Hospital Authority is not a proper party to this action[1];

b. Respondents University Health Services, Inc., Tina Johnson, and Jim Sheppard are not state actors for purposes of liability under 42 U.S.C. § 1983;

c. Respondents Richmond County Hospital Authority, University Health Services, Inc., Tina Johnson, and Jim Sheppard are entitled to summary judgment on Petitioners' Eighth Amendment cause of action;

d. Respondents Tina Johnson and Jim Sheppard are entitled to summary judgment on Petitioners' Fourteenth Amendment cause of action alleging deliberate indifference to Petitioner Mary Williams' serious medical needs;

e. Respondents Richmond County Hospital Authority and University Health Services,

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[1] Petitioners have omitted Richmond County Hospital Authority from the case caption on the Petition for Certiorari.

Inc., are entitled to summary judgment on Petitioners' cause of action alleging violations of 42 U.S.C. § 1983 and the Fourteenth Amendment;

f. Petitioners' state law claims against Respondent Richmond County Hospital Authority are barred under the doctrine of sovereign immunity; and

g. Petitioners' state law claims against Respondents University Health Services, Inc., Tina Johnson and Jim Sheppard are barred under the doctrine of charitable immunity.

On August 26, 1992, the District Court granted the Respondents' motions for summary judgment, dismissed without prejudice all pendent state claims and entered judgment in favor of all Respondents. Petitioners filed their notice of appeal with the Eleventh Circuit Court of Appeals on September 3, 1992. On April 11, 1994, the Eleventh Circuit Court of Appeals affirmed without opinion the District Court's entry of judgment in favor of all Respondents. The Petitioners did not file a petition for reconsideration with the Eleventh Circuit, but instead filed this petition to this Court.

SUMMARY OF THE ARGUMENT

Tina Johnson and Jim Sheppard are not state actors for purposes of liability under 42 U.S.C. § 1983. University Health Services, Inc., is a private, non-profit corporation and Tina Johnson and Jim Sheppard were, at all times relevant, employees of University Health Services,

Inc., and were exercising independent, professional judgment. Therefore, Petitioners cannot establish the essential elements which show that the ambulance attendants were acting under color of state law.

Petitioners' allegations that Tina Johnson and Jim Sheppard are liable under the Fourteenth Amendment do not state a valid cause of action. Petitioner's medical treatment, which forms the basis of Petitioners' allegations, does not even approach the deliberate indifference standard. Petitioners' Complaint essentially alleges that Tina Johnson and Jim Sheppard failed to perform an adequate physical examination and removed Mary Williams from the scene without properly immobilizing her. Tina Johnson attempted to examine Mary Williams while enroute to the hospital. However, because of the combination of Mary Williams' obesity, the fact that her hands were cuffed behind her back, and because the patient continued to thrash around, Tina Johnson's examination revealed no injuries.

ARGUMENT

A. PETITIONERS' PETITION FOR WRIT OF CERTIORARI DOES NOT MEET THE REQUIREMENTS FOR CONSIDERATION BY THIS COURT.

This case does not meet the requirements of Rule 10 of the Rules of the Supreme Court of the United States for granting a petition for writ of certiorari. The Eleventh Circuit Court of Appeals issued a per curiam decision

pursuant to Eleventh Circuit Rule 36-1 affirming the District Court's order. Eleventh Circuit Rule 36-1 provides for affirmance without opinion when the Court determines that a summary judgment is supported by the record and an opinion would have no precedential value. This case does not present a situation where there is a conflict between the United States Court of Appeals, nor is this a case where a lower court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power and supervision. Respondents herein submit to this Honorable Court that this Court should deny the Petitioners' writ for certiorari.

Respondents filed their motion for summary judgment on various legal grounds, many of which have not been addressed by Petitioners. Only the issues addressed by Petitioners are discussed herein.

i. TINA JOHNSON AND JIM SHEPPARD ARE NOT STATE ACTORS FOR PURPOSES OF LIABILITY UNDER 42 U.S.C. § 1983.

To succeed under 42 U.S.C. § 1983, Petitioners must establish that the alleged violations of their federally protected rights were committed under color of state law. In determining whether the state action requirement is met, the appropriate inquiry is whether the alleged infringement of the federally protected right is "fairly attributable to the state." *Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753 (1982). The alleged infringement is attributable only when it can be

said that the state is responsible for the specific conduct of which the plaintiff complains. *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2786 (1982).

In the instant case, Petitioners cannot establish the essential elements to show that the ambulance attendants were acting under color of state law.[2] The action of a private entity or individual is attributable to a state *only* if the state "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. 991, 102 S.Ct. 2777, 2786 (1982). In order for the Petitioners to meet the state action requirements, they must establish a sufficient nexus between the state and the challenged action of the ambulance attendants so that the action of the latter may be fairly treated as that of the state itself. *See, id.; Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 95 S.Ct. 449 (1974).

In *NBC v. Communication Workers of America AFL-CIO*, this Court adopted the following language from a previous Fifth Circuit case:

> If a threat of commonality is to be drawn from the various forms in which state action can manifest itself through the conduct of private parties, it is that attribution is not fair when

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[2] While the District Court's order determined that a jury issue exists as to whether state action was present in the transfer of Petitioner Mary Williams by Respondents Johnson and Sheppard, this issue may be considered by this Court. "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 474 90 S.Ct. 1153, 1156 (note 6) (1970).

> bottomed solely on a generalized relation with the state. Rather, private conduct is fairly attributable only when the state has some affirmative role, albeit one of encouragement short of compulsion, in the particular conduct underlying a claimant's civil rights grievance.

NBC v. Communication Workers of America, AFL-CIO, 860 F.2d 1022, 1025 (11th Cir. 1988), *citing, Frazier v. Board of Trustees of Northwest Miss.*, 765 F.2d 1278, 1286, modified on other grounds, 777 F.2d 329 (5th Cir. 1985), *cert. denied*, 476 U.S. 1142, 106 S.Ct. 2252 (1986).

In *Blum*, an action was brought by nursing home residents alleging improper transfer of Medicaid patients by the nursing home without certain procedural safeguards in violation of the Fourteenth Amendment. *Blum*, 457 U.S. 991, 102 S.Ct. 2777 (1982). This Court held that the Medicaid recipients failed to establish "state action" in the nursing home's decision to discharge or transfer Medicaid patients because "those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id.* at 2788.

University Health Services, Inc., is a private, non-profit corporation. Tina Johnson and Jim Sheppard were, at all times relevant, employees of University Health Services, Inc., and were exercising independent, professional judgment. Therefore, Petitioners cannot establish the essential elements which show that the ambulance attendants were acting under color of state law. Contrary to Petitioners' argument, there is absolutely no nexus between the state and the specific medical treatment provided by Tina Johnson and Jim Sheppard in the present

case. Rather, the treatment rendered by these ambulance attendants involved the exercise of their independent medical judgment.

In *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445 (1981), a prisoner brought suit under § 1983 on grounds that the public defender assigned to him did not adequately represent him. The plaintiff argued that, since the public defender was paid by the state, he was a state actor for purposes of liability under § 1983. This Court, however, found this factor insufficient to establish liability and held that a public defender does not act under color of state law in exercising "independent professional judgment." *Id* at 453.

Furthermore, this Court addressed a similar issue in *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250 (1988). "Where the issue is whether a *private* party is engaged in activity that constitutes state action, it may be relevant that the challenged activity turned on judgments controlled by professional standards, where those standards are not established by the state." *Id*. at 2257 n. 10. In the instant case, Tina Johnson and Jim Sheppard were not employed, nor under contract with the state and were at all times using their independent medical judgment in rendering care and treatment to the patient.

Petitioners' argument regarding creation of state action by virtue of assisting the police with the transport and detention of Mary Williams simply misses the point. In their Complaint, Petitioners have asserted that Tina Johnson and Jim Sheppard were deliberately indifferent to the serious medical needs of Mary Williams. Thus, it is the medical treatment of Mary Williams which Petitioners

criticize, not the detention or transport of Mary Williams. Petitioners cannot cite any evidence which demonstrates that the deputies had a supervisory role or otherwise influenced in any manner the medical treatment of Mary Williams. Thus, Petitioners' contentions that the actions of Tina Johnson and Jim Sheppard constituted state action must be rejected. Neither Tina Johnson nor Jim Sheppard were acting under color of state law pursuant to contract, agreement, instructions, or even the supervision of any state entity. Rather, Tina Johnson's and Jim Sheppard's actions, which are themselves the focus of Petitioners' allegations, constituted "independent medical judgments made by private parties according to professional standards that are not established by the State." *Blum*, 102 S.Ct. at 2788. Accordingly, the record facts establish absolutely no nexus between the state and the *medical treatment* rendered by Tina Johnson and Jim Sheppard.

ii. TINA JOHNSON AND JIM SHEPPARD ARE ENTITLED TO SUMMARY JUDGMENT UPON PETITIONERS' FOURTEENTH AMENDMENT CAUSE OF ACTION ALLEGING DELIBERATE INDIFFERENCE TO MARY WILLIAMS' SERIOUS MEDICAL NEEDS.

Mary Williams was not convicted of any crime at the time she alleged that her Constitutional rights were violated. Neither has she been convicted of any crime since the time of the incident which forms the subject matter of Petitioners' complaint. Petitioners have alleged that Tina Johnson and Jim Sheppard deprived Mary Williams of

"her Constitutional rights under the Eighth and Fourteenth Amendments." Case law clearly demonstrates that recovery is not available to Petitioners under the Eighth Amendment to the United States Constitution in this case. Nonetheless, many courts have equated the rights of a pretrial detainee under the Fourteenth Amendment with the rights of convicted individuals under the Eighth Amendment. The standard to measure the state's duty under the due process clause for pretrial detainees for medical care is the "deliberate indifference to serious medical needs" standard set forth by this Court in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976).

Petitioner Mary Williams stated in her deposition that she has no criticisms of any of the ambulance attendants; however, Petitioners set out the following particulars in their Complaint which they contend constitute deliberate indifference to the serious medical needs of Mary Williams:

> When the Defendants JOHNSON and SHEPPARD arrived at the scene, the sheriff's deputies did not tell them that MARY WILLIAMS had received a gunshot wound.
>
> Neither Plaintiff MARY WILLIAMS nor Defendants JOHNSON and SHEPPARD learned that Mrs. Williams had been shot until after she was examined at the hospital.
>
> Defendants JOHNSON and SHEPPARD did not perform an adequate physical examination upon Plaintiff MARY WILLIAMS, and they removed her from the scene with a bullet lodged against her spinal cord without properly immobilizing her.

> One of the Richmond County sheriff's deputies present at the scene of the shooting told Defendants JOHNSON and SHEPPARD that Plaintiff had been "hit", but Defendants JOHNSON and SHEPPARD failed to make further inquiry to find out what was meant by the remark that she had been "hit".
>
> The willful, wanton and conscious failure of Defendants JOHNSON and SHEPPARD to adequately assess and respond to MARY WILLIAMS' catastrophic injury amounted to deliberate indifference to her serious medical needs, thereby depriving her of her constitutional rights under the 8th and 14th Amendments.

Petitioners have not cited any split among the lower circuit courts in applying the deliberate indifference test set forth by this Court in *Estelle*. In *Estelle*, this Court emphasized the height of the hurdle over which a plaintiff must ascend to meet this test, holding as follows:

> In the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain or to be repugnant to the conscience of mankind'. Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. *Id.* at 292.

In *Estelle*, the plaintiff brought a claim against a prison physician contending that more should have been done by way of diagnosis and treatment for a back injury. This Court held that a claim questioning a medical provider's diagnostic techniques or forms of treatment is a classical example of a matter for medical judgment and at

most is medical malpractice, but is not sufficient to present a constitutional claim. *Id.*

In *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078 (1986), this Court analyzed the standard previously set forth in *Estelle*. This Court held "it is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by [the Constitution], whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Id.* at 1084; *see further, Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321 (1991).

Petitioners' Complaint essentially alleges that Tina Johnson and Jim Sheppard failed to "perform an adequate physical examination" and removed the Petitioner Mary Williams from the scene "without properly immobilizing her". Further, the facts of this case demonstrate that the ambulance attendants were not aware that Mary Williams had been shot by Deputy Buchanan until after arrival at University Hospital. Petitioners admit in their Complaint that "neither Plaintiff Mary Williams nor Defendants Tina Johnson and Jim Sheppard learned that Plaintiff Mary Williams had been shot until after she was examined at the hospital." The undisputed evidence demonstrates that Tina Johnson examined Mary Williams while enroute to the hospital. However, because of the combination of Mary Williams' obesity, the fact that her hands were cuffed behind her back, and because the patient continued to thrash around, Tina Johnson's examination revealed no injuries.

Accordingly, Petitioners' allegations do not even approach the deliberate indifference standard set forth above. Mrs. Williams was not refused treatment nor was access to treatment delayed. Once Mrs. Williams was removed from the house, she was attended by trained medical technicians and taken immediately via ambulance to a nearby acute-care facility where she could be treated by physicians. Therefore, the Eleventh Circuit correctly affirmed the District Court's award of summary judgment as to Petitioners' Fourteenth Amendment cause of action.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted this 5th day of July, 1994.

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